SEP 1 1993

NO. 93-149

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ROBERT D. FISH,

Petitioner

versus

JOAN MARIE COLLINGS, Et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT

CONSOLIDATED REPLY TO OPPOSITIONS ON PETITION FOR CERTIORARI

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ARGUMENT

1. A VIABLE PREEMPTION ISSUE EXISTS BECAUSE PETITIONER PREVAILED IN A NON-SUIT, ON THE MERITS, AFTER A FULL-BLOWN TRIAL OF THE FRAUD ISSUES.

The respondents' entire argument with respect to preemption is that the issue does not exist. In the respondents' distorted view, the Petitioner perpetrated a fraud, he escaped liability by declaring bankruptcy, the fraud issues were mooted on the technical or procedural grounds of discharge, and petitioner's malicious prosecution causes of action were thereby rendered inapplicable regardless of the law on preemption. Such arguments sound nice, but only because the respondents leave out two critical, undisputed facts.

The first critical fact is that the fraud charges against petitioner were resolved on the merits, in a full-blown, two day trial. (See Petition For Review, pages 18-19). They were most definitely not resolved on "technical" or "procedural" grounds as implied in

the respondents' opposition briefs. The inescapable consequences of trial on the merits are that (a) the respondents' bankruptcy action (the subject of petitioner's first cause of action), was "favorably terminated," and (b) the demurrer which eliminated that cause of action was based on the federal law of preemption, and not on some technicality in the state law of malicious prosecution.

Indeed, preemption was the only argument raised with respect to the petitioner's first cause of action in the respondents' Points and Authorities supporting the demurrer (1 AA 84-85), and the transcript of the hearing on the demurrer shows that the court based its ruling exclusively on preemption. (1 Reporters Transcript "RT", page 3). Thus, preemption is clearly at issue on review, and the respondents' arguments to the contrary are supported by nothing but sophistry. The respondents' arguments are merely an audacious attempt to deceive this Court, and thereby avoid review of what the respondents know are completely erroneous rulings.

The second critical fact ignored by the respondents is that the petitioner prevailed on the

fraud issues in a non-suit, not under the normal bankruptcy standard of "clear and convincing" evidence, as implied in the respondents' briefs. By definition, a federal non-suit means that the respondents failed to present even a prima facie case of fraud. Fed. R. Civ. Proc. Rule 41(b); *White v. Abrams*, (9th Cir. 1974), 495 F.2d 724, 729. The non-suit also means that even if the fraud charges had been tried in the state court, using preponderance of the evidence as the standard of proof, the petitioner would still have prevailed because the respondents could not even muster a prima facie case. It is true that the respondents were required to dismiss the state case in light of the bankruptcy discharge, but the non-dischargeability action was based exclusively on allegations of fraud, and the non-suit conclusively determined petitioner's innocence of fraud for all purposes. The state courts, which are supposed to look behind the technicalities, were required to consider the dismissal as a favorable termination.

In short, while petitioner's position is based squarely on the application of federal statute and federal case law to undisputed facts, the

respondents' arguments are based on readily distinguishable state cases, and avoidance of the facts. The respondents' opposition briefs follow the lead of the Court of Appeal, and do not even mention the words "trial" or "non-suit". They certainly do not address any of the legal consequences of the fact that petitioner prevailed on a non-suit, after a full trial. Similarly, the respondents' opposition briefs do not even attempt to distinguish petitioner's citation of this Court's own holding in *Business Guides v. Chromatic Comm.*, 498 U.S. __, 112 L. Ed. 2d 1140, 1160, 111 S. Ct. ___ (1991).

This is absurd. Do the respondents really think that mere avoidance of the facts and the law can fool the highest court in the land? The only plausible explanation for the respondents' pathetic briefs is that they have no viable counter-arguments. Their best bet is to ignore the facts, ignore the issues, and hope that this Court's heavy calendar will prevent review.

Perhaps it should come as no surprise that the respondents are attempting to deceive this Court through misrepresentation of the facts and silence on

the federal law. After all, both the San Diego Superior and Appellate courts were perfectly willing to ignore critical facts and binding authority. Neither the respondents nor the courts below ever even addressed the bankruptcy jurisdictional statutes. Doing so would have necessitated the conclusion that subject matter jurisdiction over malicious prosecution is either non-existent or at most concurrent in the bankruptcy courts. Neither the respondents nor the courts below ever even addressed the fact that only three of the nine respondents were before the bankruptcy court, and that preemption could not possibly have applied to the other six. Yet again, neither the respondents nor the courts below ever even addressed the intent of Congress in establishing the limited jurisdiction of the bankruptcy courts, or the obvious inconsistency of the holdings below with patent, securities and copyright law.

All of these issues were raised repeatedly by respondent, and were systematically ignored. Has our country really devolved to the point that well-connected parties can prevail simply by ignoring the relevant facts and the binding authority, or that

review by the U.S. Supreme Court can be avoided with the ridiculous argument that a demurrer decided exclusively on the basis of preemption does not fairly raise the issue of preemption?

2. THE EQUAL PROTECTION AND DUE-PROCESS ARGUMENTS ARE UNQUESTIONABLY SUPPORTED BY THE RECORD.

It is repugnant to any notion of justice that respondents are attempting to avoid review by dismissing petitioner's equal protection arguments as mere paranoia. The Petition For Review went into considerable detail to demonstrate that the standard of favorable termination applied against the petitioner was spurious, and had never before been applied to anyone else. The respondents could have obliterated petitioner's argument by providing even one case citation, or even one law review article in support of the rulings below. But they didn't because they can't. The simple fact is that there is no support, anywhere, in any authority, for the injustice visited upon the

petitioner by the San Diego trial court and the San Diego-based Court of Appeal.

The Opinion below is simply wrong, and petitioner was "railroaded" by the courts. Neither of the opposition briefs offered any substantive analysis to support the unconstitutional actions of the courts below, for the obvious reason that there are no reasonable arguments to be made in their favor. The insurer's opposition brief makes a quick stab at the pro per issue, but fails to present even one single fact in support of the argument. The entire "analysis" is based on the Court of Appeal's dicta that petitioner's allegations are speculative and "without support in the record." Such a conclusion is clearly erroneous. In his Petition, the respondent gave specific, indisputable evidence, quoted directly from the record, to show that Judge Hollywood's ruling against petitioner was colored by petitioner's status as a pro per litigant. Judge Hollywood's exact words were:

> "You're in pro per, and that also colors my judgment about what you're seeking."

(2 RT 2, lines 16-19, 20-21). This is hard evidence of unconstitutional bias, and in the complete absence of any substantive argument to the contrary, petitioner deserves at least the chance to demonstrate violation of his constitutional rights.

Moreover, the respondents' briefs are completely silent on the worst violations of petitioner's due process rights. Using specific, undisputed evidence directly from the record, the petitioner proved that judge McConnell ruled against petitioner secretly, and without giving him an opportunity to appear (see Petition, pages 23-24), and that Judge Kapiloff ruled against petitioner based upon a telephone conversation with a judge before whom petitioner never had an opportunity to appear (see Petition, page 25). These issues were raised consistently in the pleadings below, and the respondents had ample opportunity in their latest briefs to argue the facts in their favor.

But once again the respondents didn't even address the issues. There simply are no good counter-arguments to blatant violations of due process, where the court records themselves evidence the violations.

The plain fact is that petitioner's due process rights have been repeatedly violated, and the San Diego courts could not bring themselves to rain justice upon individuals wielding local political clout.[1] The net effect is that an individual who was maliciously charged with fraud in both federal and state courts, and who prevailed in a non-suit against the fraud charges, has been completely precluded by unconstitutional behavior of the courts from obtaining any damages. The respondents did not, and cannot dispute these facts.

CONCLUSION

The petitioner has gone to considerable lengths in his Petition to present the facts and the law in a well reasoned, well supported manner. The respondents and the courts below have done just the opposite. They have completely ignored two critical facts, and they have completely ignored all of the federal law on

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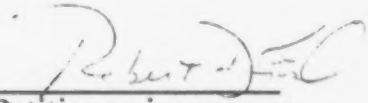
[1] One of the defendants is the son of a San Diego federal judge, and another is a past commodore of the San Diego Yacht Club.

preemption. The opposition briefs filed before this Court are a joke, failing to address in any substantive manner any of petitioner's arguments. The inconsistent state and federal holdings raised in the petition regarding bankruptcy and preemption are matters which only this Court can resolve, and the constitutional violations by the lower court are perhaps the sine qua non of this Court's very existence. Failure to grant this petition would constitute a great dis-service to this nation.

Respectfully submitted,

Dated: October 31, 1993



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